Phelps Cement Products, Inc. *and* **Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region.** Case 3-CA-9460

July 21, 1981

DECISION AND ORDER

On March 9, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and an answering brief,[1] and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Phelps Cement Products, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] We hereby grant the Charging Party's unopposed motion to correct the transcript.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit the Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge, nor do we perceive any evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard at Rochester, New York, on June 18, 19, and 20, 1980, based on an original charge filed by Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region on December 4, 1979, and amended December 20, 1979.[1] The complaint, issued January 11, 1980, alleges that, after having recognized the Union on November 28, Respondent violated Section 8(a)(5) and (1) of the Act on or about November 29 by refusing, and thereafter continuing to refuse, to bargain collectively with the Union as the exclusive representative of Respondent's employees in an appropriate unit composed of all garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

As alleged in the complaint and admitted in the answer, as amended, I find that Respondent is, and has been at all times material herein, a New York corporation having its principal office and place of business at Newark Street, Phelps, New York, where it is engaged in the manufacture, sale, and distribution of building cement blocks and related products. Annually, in the course and conduct of its business operations, Respondent purchases, transfers, and delivers to its Phelps plant sand, gravel, cement, and other goods and materials valued in excess of $500,000, of which goods and materials valued in excess of $50,000 were transported to the Phelps, New York, plant from enterprises outside the State of New York which in turn received said goods and materials directly from States other than the State of New York. I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent is a manufacturer of concrete blocks and a retail hardware and masonry supplier to contractors and the general public. Credited testimony by Respondent President Philip Haers, Jr., described Respondent's operation as follows: Outside suppliers deliver by truck and unload cement for use in Respondent's automated block machine, attended by a machine operator. This machine manufactures the cement blocks which are then moved on pallets to a kiln by a lift truck driver. The finished blocks are then again moved by yard employees for storage in the yard area until sold. Sales are made and orders are filled by Phelps' sales employees and are delivered by Respondent's drivers utilizing Respondent's own trucks.[2] Credited testimony by William Shattuck, a Phelps block plant employee at the time of the events in question, and James Walters, business representative for Local 43, sets forth the details of the Union's organizational drive. Walters and Shattuck were bowling companions. It was in late October while bowling that Shattuck first approached Walters about the possibility of organizing Phelps. Walters expressed interest, but it was

[1] All dates are in 1979 unless otherwise specified.

[2] The record establishes that the Haers family, who compose the principal owners and management of Phelps Cement Products, Inc., also own and operate another company, Phelps Guide Rail, Inc., utilizing totally different management and employees. Phelps Guide Rail, Inc., is not involved in this proceeding.

not until early November, after Shattuck assessed dissatisfaction among his fellow employees based on the amount of their annual raise, that Shattuck obtained a supply of authorization cards from Walters and began soliciting signatures in and around the plant.[3] At a union meeting at Shattuck's home on November 13, attended by Shattuck, Joseph Schetrompf, Ernest Tillman, and William Leisenring, Walters explained that the purpose of the cards was union representation and to protect their jobs in case anything came up with the Company, because it was unlawful to fire them for union activity. After collecting the cards he secured at the meeting and those obtained by Shattuck earlier, Walters announced that they had a majority and that he would seek recognition from the Company, but that if recognition was denied they only needed 30 percent to have an NLRB election.[4]

On November 28 Walters arrived at the Company at approximately 2 p.m. He was alone. Walters had in his possession 10 authorization cards.[5] Walters entered the Phelps office and asked to see Phil Haers. The man behind the desk, later identified as Charles Haers, inquired concerning Walters' business, and received the response that it was union business. After a minute's delay, while Charles left the reception area and entered the main office, Walters was directed to the office of Philemon Haers, Sr.[6] Walters introduced himself as business representative of Local 43 and stated that he was there representing a majority of Phelps' employees. Haers Sr. responded, with reference to some papers on his desk, that he was working on a pension plan that had taken many years to develop, which he now supposed was going to go down the drain. Walters answered that this was not necessarily the case, just because the Union represented his employees, since a pension plan and welfare benefits were a matter for collective bargaining. Then Walters stated that he had authorizations from the employees and that Haers Sr. had the prerogative of either looking at the authorizations and recognizing the Union or not recognizing them and going to an election. Haers Sr. stated that he preferred an election. He asked if Guide Rail employees should be included, but Walters replied he understood Guide Rail was a separate corporation currently represented by other unions. Haers Sr. asked about secretaries, and Walters responded that secretaries were not included in the unit, nor were salespeople. Then Walters asked what was the advantage of going to an election when he had a majority. Walters said that he had 10 cards with him, plus 2 other employees committed to sign. He stated that if they went to an election it would only delay things and could result in more difficult negotiations. Then Haers Sr. asked to see the authorization cards. Walters produced the cards in his possession, placing them on the desk where Haers Sr. went through them.

Up until this point Walters and Haers Sr. had been alone in the office, but then Phil Haers, Jr., arrived. He asked what the Bricklayers were doing there. Haers Sr. answered that the Union had authorizations from a majority of their employees and wanted to negotiate a contract. Haers Jr. asked if the Bricklayers normally got "involved in this type of thing." Walters answered that they had never represented plant people, but that the employees had come to them and asked for representation and that was how they got involved. He said that it was not unusual for their International to represent other types of workers and that they had several block plants and even a milk plant. There followed some discussion between the two Haerses concerning whether they should accept the authorizations or have an election. Haers Jr. asked his father what he thought, and Haers Sr. replied that he could not see at this point the advantage of going to an election. He said it would only delay things. He stated possibly they were better off with the Bricklayers rather than the Teamsters. After some further conversation between the two Haerses speculating about what prompted the employees to want the Union, the Haerses went through the authorization cards together. Then Phil Haers Sr. said he did not exactly know how many employees were on the payroll at present and Haers Jr. asked if they could take 2 or 3 days to think the matter over. Walters said no, that he wanted an answer that day before he left the office. Walters stated that if they were going to recognize the Union, it was fine, but that if they were not he wanted to petition immediately in the morning for an election. At that point Haers Sr. asked if Walters would mind leaving the room while he and his son talked the matter over. Walters agreed and went to the outer office as Haers Sr. called to his payroll clerk to bring in the payroll book. She entered, closing the door, as Walters exited.

After 5 or 6 minutes Walters was invited back inside the office where he found the two men discussing who the unit employees would be. Walters produced a list of employees' names he had compiled, classified by the sections of the plant in which they worked and their payroll numbers.[7] Walters proceeded to read the list of names while the payroll clerk verified it against the payroll book. This comparison revealed only two discrepancies. James Tillman, one of Walters' 10 card signers, had quit his employment at the Company sometime between when he signed the card and Walters' visit to the plant that day. Eric Van Doyan, who was not a card signer,

[3] The cards, introduced into evidence without objection, were headed "Authorization For Representation," and contained the wording, "I, the undersigned, hereby authorize the BRICKLAYERS, and ALLIED CRAFTSMEN LOCAL UNION NO. 43, 362 Exchange Street, Geneva, New York, 14456, as my collective bargaining representative for all matters pertaining to wages, benefits, and working conditions."

[4] None of the employee card signers who testified claimed that they were coerced in any way into signing or that they were told the card would be used only to secure an election. Those who remembered only being told that the card would protect their jobs also acknowledged that they knew that the card authorized a union to represent them.

[5] Counsel for the General Counsel introduced into evidence nine authorization cards bearing the signatures of employees Joseph Schetrompf, Frederick E. Little, William C. Leisenring, William M. Shattuck, Jr., Hector Caraballo, Harold McAllister, Orville G. Dates, Ernest Tillman, and Ross H. Wilck. I find these cards to be authentic and valid and, under the circumstances described hereafter, constituted a majority of the employees in an appropriate unit.

[6] Philemon Haers, Sr., also frequently referred to as Haers, Sr., was at all times material herein chairman of Respondent's board of directors. Charles Haers, his brother, was and is employed as Phelps' dispatcher.

[7] This list was introduced into evidence as G.C. Exh. 3.

but appeared on Walters' list as a garage employee, was confirmed to be an employee of Guide Rail. After noting that supervisors, secretaries and clerical workers, and salesmen were not considered part of the unit, Phil Haers, Sr., announced that there were 16 employees.[8]

After the payroll clerk left the room Phil Haers, Jr., inquired about what the next step would be if Respondent recognized the Union. Walters answered that he would ascertain what the employees' feelings were concerning the Union's contract proposals and would prepare and forward a basic contract proposal to the Company. Following some further discussion between the Haerses with respect to negotiations, Phil Haers, Sr., said, "Well, I guess we might as well go ahead and get it over with." At that point the discussion turned to the topic of negotiations. Phil Haers, Jr., expressed concern over beginning negotiations during the Company's busy season immediately prior to the Christmas holidays. He said he would like negotiations to begin, if possible, in January or February and then in the evening. Walters answered that by the time he had assembled an employee bargaining committee, and had formulated and forwarded their contract proposals to the Company, with an opportunity for the Haerses to review those proposals, it would more than likely require that the first meeting be held sometime in January. Walters emphasized that he did not want to interfere with the Company's operations. After answering some questions from the Haerses with respect to why the employees wanted a union, Walters asked if they had any written information on company benefits. Phil Haers, Sr., described the existing employee benefits. Phil Haers, Jr., promised to try to locate an extra copy of the Company's pension, profit-sharing, and welfare program which he would forward to Walters. Then Phil Haers, Sr., said, "Just because we agree to negotiate does not mean we have to accept their proposals." Walters responded this was true, proposals were a matter for negotiations, and that Local 43's other contracts contained a binding arbitration provision in the event of a bargaining impasse. He said, if it was acceptable to the Haerses, they could do the same thing in these negotiations, and both company officials expressed interest in this idea. The meeting adjourned, and Walters left the office at or about 4:40 p.m.

In their testimonies Phil Haers, Sr., and Phil Haers, Jr., denied that they agreed to recognize the Union during the meeting with Walters on November 28. Both men insisted that throughout the course of the meeting they consistently took the position that the bargaining unit was larger than 16 employees and that all eligible employees should have an opportunity to vote in an election. They testified that the authorization cards, which they counted, were Xerox copies of handwritten authorizations, which did not contain either the name of the Union or the heading "Authorization For Representation." Philip Haers, Jr., conceded, however, that at some point in the meeting his father stated that they would be better off with Walters' Union than the Teamsters and also said that just because he recognized the Union would not mean that he had to accept its proposals. Both Haerses agreed that the conference with Walters lasted in the vicinity of 2 hours and that the discussion covered a wide variety of topics as Walters attempted "to sell us on the Union." Phil Haers, Jr.'s testimony noticeably omits any details of that portion of the conference which took place following the discussion of which employees, based on the payroll book, should be included in the bargaining unit. This was the portion of the meeting in which Walters testified the subject of commencing negotiations was discussed. Likewise, Phil Haers, Sr., in his testimony omitted any detailed reference to this substantial segment of the conference, until elicited by Respondent's counsel by a leading question. Therefore, in all cases where their respective testimonies conflict, I credit Walters' more detailed and comprehensive version, and find that Respondent recognized the Union during the November 28 meeting as collective-bargaining representative for an agreed-upon 16-employee unit composed of garagemen, truckdrivers, and plant and yard employees, as alleged.

It is undisputed that immediately following the November 28 meeting with Walters, Phil Haers, Sr., and Phil Haers, Jr., convened a special meeting of the board of directors. Phil Haers, Jr., told the assembled members Walters had been there, and "that he had cards with the signatures of the employees, wanting them as their representative; and there has to be a decision made whether to accept that on that basis or a decision made whether to give all the employees a chance to vote." After some deliberation, the meeting ended with Haers Jr. being instructed to note to call Walters the following day and tell him that the Company wanted an election. Phil Haers, Jr., talked to Walters by telephone the following morning. In response to his statement that there would have to be an election, Walters replied, "I don't think you can do that. I will see about that." Walters then stated that he would have to contact his attorney and the conversation ended.[9] It is therefore clear, and I find, that Respondent reneged on its original recognition of the Union as exclusive collective-bargaining agent for an appropriate unit of the Respondent's employees. Thus, Respondent violated Section 8(a)(5) and (1) of the Act.[10] *Lyon & Ryan Ford, Inc.*, 246 NLRB 1 (1980); *Jerr-Dan Corp.*, 237 NLRB 302 (1978).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[8] These were garage employees Harold Smith and Wayne Stone; truckdrivers Fred Sapp, Thomas Rieke, Walter Jaycox, Issac Suwyn, Joseph Schetrompf, and Harold McAllister; plant employees Hector Caraballo, William N. Shattuck, Jr., and Orville Dates; and yard employees William Leisenring, Ernest Tillman, Ross Wilck, and Fred Little. The 16th employee, whom Walters could not remember since that name did not appear on his list, was raised by the Company during the examination of the payroll book.

[9] Based on an amalgam of the credited testimony of Walters and Phil Haers, Jr.

[10] Having found that Respondent did in fact recognize the Union on November 28, and that the 16-man unit discussed in the Walters-Haers conference is an agreed-upon appropriate unit, I find it unnecessary to decide whether, based on their credited testimony concerning their duties, Phelps' employees Earl Hence, Charles Haers, Michael Melito, and Charles Burmaster should also be included in the unit.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Beginning on November 13, the Union represented a majority of the employees in the appropriate unit described above in paragraph 3, and has been, and is, the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. On November 28 Respondent recognized the Union as the representative for purposes of collective bargaining of the employees in the appropriate unit described in paragraph 3.

6. By withdrawing recognition from and refusing to bargain collectively with the Union as exclusive collective-bargaining representative of the employees described in the appropriate unit set forth above in paragraph 3, beginning November 28 and continuing to date, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent withdrew its recognition of the Union and refused to bargain collectively in good faith with the exclusive representative of its employees in the appropriate unit described herein, I shall order Respondent to restore recognition to and, upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. Because the character of the Respondent's unfair labor practices was clearly directed towards the destruction of any collective-bargaining relationship with the Union, I find a broad cease-and-desist order is necessary. In addition, Respondent will be ordered to post an appropriate notice encompassing the violations committed.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Phelps Cement Products, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet, and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.[12]

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore recognition to and, upon request, bargain with Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region, as the exclusive collective-bargaining agent of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Phelps, New York, plant copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] The appropriate collective-bargaining unit is:

> All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing a Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity t present evidence and state their positions, the Nation Labor Relations Board found that we have violated th National Labor Relations Act, as amended, and has o dered us to post this notice.

> WE WILL NOT refuse to recognize and bargain good faith with Bricklayers, Masons and Plasterer Local Union No. 43 of the Fingerlakes Region, t withdrawing recognition from and refusing to me and bargain with the Union as the duly certified e

clusive collective-bargaining agent of our bargaining unit employees. The bargaining unit is:

All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL restore recognition to and, upon request, bargain with Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region, as the exclusive collective-bargaining agent of our employees in the bargaining unit set forth above and, if an understanding is reached, embody such understanding in a signed agreement.

PHELPS CEMENT PRODUCTS, INC.